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**IN THE SUPREME COURT
STATE OF ARIZONA**

PETITION TO AMEND RULES

35 AND 37, ARIZONA RULES

OF CIVIL PROCEDURE

Petition No. R-09-0040

**COMMENT OF THE
ARIZONA TRIAL LAWYERS
ASSOCIATION/ARIZONA
ASSOCIATION FOR JUSTICE
TO THE PETITION SEEKING
TO AMEND RULES 35 AND 37
OF THE ARIZONA RULES OF
CIVIL PROCEDURE**

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Preliminary Statement

The Arizona Trial Lawyers Association/Arizona Association for Justice—acting on a resolution of its Board of Directors and through its Amicus Committee—comments on and objects to the petition proposing changes to Arizona Rule of Civil Procedure 35.

First, the petition misconstrues vocational examinations. A mandatory vocational examination is really an ex parte deposition by proxy. In that vocational examination, an agent of the defense can interrogate the plaintiff without a court reporter, without judicial oversight, and without the presence of plaintiff’s counsel—if the presence of plaintiff’s counsel “may adversely affect the outcome of the examination.”¹ But those ex parte interrogations are not needed, since defense vocational-rehabilitation specialists can get facts for a vocational assessment from depositions, from paper discovery, from a plaintiff’s medical, work and educational records, and from an independent medical examination. Thus, this Court should not change Rule 35 to allow for presumptive vocational examinations.

Second, a defendant should also not have a presumptive right to make audio or audio-visual recordings of every physical and mental examination. This Court should retain the good-cause requirement, since it protects a

¹ ARIZ. R. CIV P. 35(a).

plaintiff's reasonable expectation that physical and mental examinations will *not* automatically be recorded. On the other hand, if a plaintiff wants to waive the right of privacy and have an audio or audio-visual recording of a physical or mental examination, that is the plaintiff's choice. After all, the plaintiff is the one having the protected right of privacy. Letting a defendant automatically record an examination—and then forcing a plaintiff to get a trial-court order to block it—improperly burdens the plaintiff's privacy rights.

Third, the requirements for judicial supervision and “good cause” for ordering a physical or mental examination should remain intact. A mental or physical examination always invades privacy. While parties to a lawsuit can normally agree to a mental or physical examination, a plaintiff will sometimes oppose the examination for privacy or other reasons. In those cases, the trial court is the only impartial referee. To protect privacy, the judicial-order and good-cause requirements should continue in force.²

Legal Argument

- 1. A “vocational examination” is an ex parte deposition by proxy, conducted with none of a deposition's protections.**

Except for Rule 35, the discovery rules do not give a party the right to

² Besides privacy, safety is a concern. Doctors and psychologists have specific training on how to avoid injuring a person under examination. Non-doctor and non-psychologist vocational-rehabilitation experts do not have that same training. If they perform physical or mental tests, they could cause further harm to the victims they are examining.

have one of its agents interview the opposing party in the absence of that opposing party's lawyer and with no immediate recourse to judicial oversight. Thus, "the ability of a trial court to coerce a party to submit to a vocational examination and interview, without the presence of counsel, is a serious question of law."³

A vocational examination is *not* a mental or physical examination. Instead, a vocational examination explores a person's: (1) background; (2) mental health; (3) career development; (4) daily life activities; (5) education and special training; (6) chronology of vocational activity near the disputed event; and (7) potential physical or psychological problems that may affect career development.⁴

A 2009 treatise on conducting vocational examinations explains that the usual areas of inquiry for a vocational-examination interview are:

- *Medical information*, including medical conditions, treatment history, and the impact of medical conditions on function.
- *Psychological information*, including psychological conditions, treatment history, and impact of conditions on function.
- *Social information*, including family background, residence, etc.
- *Educational information*, including completed educational level, type of education completed, success level in education, plans for

³ *Acosta v. Tenneco Oil Co.*, 913 F.2d 205, 208 (5th Cir. 1990).

⁴ MICHAEL SHAHNASARIAN, ASSESSMENT OF EARNING CAPACITY at 17 (Tucson: Lawyers & Judges Pub. Co., 2nd ed. 2004).

additional education, steps taken toward additional education, etc.

- *Employment information*, including jobs held, length of time in jobs held, earnings, future employment plans/desires, etc.⁵

Besides that, a vocational examination has some small parts that resemble mental and physical examinations. But if part of the examination is a mental examination, a psychologist or psychiatrist should perform it under the present rule. And if part of the examination is a physical examination—such as testing range of motion—a physician should perform it under the present rule.

The leading handbook on vocational assessments also tells vocational examiners to document “candor” and “motivation”:

Throughout the clinical interview, the vocational expert should critically observe the subject’s overall presentation involving nonverbal behavior, approach toward the examination, and apparent level of effort, obsequiousness toward the vocational expert, superficial cooperation with the examination, pain behavior that is not supported by medical evidence, and tendencies toward overstatement or understatement should be noted. Information of this type can support hypotheses about a subject’s candor or motivation, especially when integrated with other research.⁶

So after stripping away the small mental-and-physical-examination parts of a vocational examination, all that’s left is an ex parte interrogation. In

⁵ STAN OWINGS, A LAWYER’S GUIDE TO UNDERSTANDING EARNING CAPACITY ASSESSMENT AND EARNING CAPACITY OPINIONS at 189 (Chicago: American Bar Association, Tort Trial and Insurance Practice Section, 2009).

⁶ MICHAEL SHAHNASARIAN, ASSESSMENT OF EARNING CAPACITY at 17 (Tucson: Lawyers & Judges Pub. Co., 2nd ed. 2004).

fact, on most issues, what an examiner asks at a vocational examination is virtually identical to what a defense lawyer asks at a deposition. The difference is that, at a deposition, the plaintiff has the unquestioned right to have a lawyer present to:

- (1) confer with;
- (2) make objections;
- (3) ask clarifying questions;
- (4) guarantee that the record is accurate;
- (5) provide reassurance and moral support;
- (6) seek help from the trial court if disputes arise;
- (7) require the examiner (defense lawyer) to act professionally; and
- (8) halt the deposition if the defense lawyer harasses the deponent or exceeds a deposition's legitimate scope.

Besides being an ex parte deposition by proxy, a mandatory vocational examination is duplicative. The defense can get the facts for a vocational-rehabilitation assessment through an IME, by deposing the plaintiff and others, and by getting work, educational, and medical records. A mandatory vocational examination forces a plaintiff to endure a second, time-consuming deposition, although even one deposition is an unsettling ordeal.

The idea of forcing a plaintiff to endure a vocational examination in a

routine civil action is something that the Arizona Court of Appeals rejected in the 1991 case of *Avila v. Superior Court*.⁷ The plaintiff in *Avila* had suffered injuries in a car crash and was making large lost-earnings and lost-earning-power claims. The plaintiff had done his own vocational testing and intended to present evidence from a vocational-rehabilitation specialist that he could no longer work as a carpenter. The defendant filed a Rule 35 motion to force the plaintiff to undergo testing by its own vocational-rehabilitation specialist. The testing would be psychological and mental, as well as physical (including range of motion). The motion did not show that the defendant's vocational-rehabilitation specialist was a doctor, but the trial court granted the motion.⁸

The Court of Appeals accepted the injured carpenter's petition for special action and vacated the trial court's order granting the motion for an independent examination by a vocational specialist.⁹ The Court made that ruling for three main reasons: *First*, commentators and the weight of federal cases held that Rule 35 excluded a vocational-rehabilitation examination from Rule 35's scope—absent a showing that the examiner was a psychologist or physician.¹⁰ Indeed, Rule 35's text specifically limited those who could do examinations. Moreover, letting vocational rehabilitation specialists conduct

⁷ *Avila v. Superior Court*, 169 Ariz. 49, 816 P.2d 946 (App. 1991).

⁸ *Id.* at 50, 816 P.2d at 947.

⁹ *Id.* at 52, 816 P.2d at 949.

¹⁰ *Id.* at 51, 816 P.2d at 948.

Rule 35 examinations was problematic in light of “the myriad of [vocational-rehabilitation specialists’] possible backgrounds—clinical, behavioral, or educational psychology; counseling or vocational experts; and degrees ranging from a bachelor’s to a Ph.D.”¹¹ Approving that loose set of examiners “would put courts in the difficult business of determining whether a particular individual has received sufficient training to conduct a highly intrusive examination into a party’s private life.”¹²

Second, the Court excluded a vocational-rehabilitation examination from Rule 35’s scope because of a Rule 35 examination’s “unique nature.”¹³ Any physical or mental examination entailed “an invasion of personal privacy.”¹⁴ And Rule 35 thus properly limited who could do the examining.¹⁵

Third, a person examined under Rule 35 is not unquestionably entitled to the presence of legal counsel during an exam. In fact, Rule 35 is the “only discovery mechanism that enables a party to obtain ‘unsupervised interrogation,’ through a potentially intrusive procedure, of its opponent by its own agent.”¹⁶ Thus, Rule 35 “contains a specific ‘good cause’ requirement,

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 52, 816 P.2d at 949.

¹⁵ *Id.*

¹⁶ *Id.* (quoting *Acosta v. Tenneco Oil Co.*, 913 F.2d 205, 210 (5th Cir. 1990)).

above and beyond” the general Rule 26(b) relevancy standard for discovery in general.¹⁷

Moreover, a defendant’s alleged need to have an opinion from its own vocational-rehabilitation specialist does not automatically establish “good cause.”¹⁸ After all, as discussed above, a defendant already has many sources of information for its vocational-rehabilitation specialist:

For example, if a plaintiff has already been examined by a vocational rehabilitation specialist, a defendant may obtain the results of the examination and provide them to its own expert. Defendant may also depose the plaintiff, depose the plaintiff’s expert, and impeach either or both of them with the opinion of its own expert; additionally, defendant may compel examination of plaintiff by a licensed physician, and make the results of that examination available to its vocational rehabilitation specialist.¹⁹

The petition wilts in light of a vocational examination’s basic nature. It’s basically a duplicative ex parte deposition of a plaintiff by the defendant’s proxy. The defendant can obtain full information to determine vocational history and earning capacity from an IME, from depositions, and from written discovery.²⁰ Thus, this Court should not amend Rule 35 to give an automatic

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See, e.g., *In re Falcon Workover Co., Inc.*, 186 F.R.D. 352, 353 (E.D. La. 1999) (“In the context of a vocational expert, there is often no need for an ‘examination’ as such, particularly when the moving party is allowed access to all of the claimant’s medical records, has the opportunity to depose the claimant, and is provided with the results of tests performed by claimant’s

right to mandatory vocational examinations.

2. **Making an audio or audio-visual recording of a physical or mental examination can sometimes protect the party to be examined. But giving the examining party an automatic right to make the recording is an unfair invasion of privacy.**

The proposal to presumptively let the party who noticed a physical or mental examination make an audio or audio-visual recording of the examination is disturbing. Under the petition, even the most intimate or invasive examination can be recorded presumptively. And the proposal would force the party subject to the examination to go to the trouble and expense of opposing it. That upends the fair, logical balance of privacy.

An audio or audio-visual recording can sometimes be important—and fair. For instance, recording may prove that the physical or mental exam was perfunctory, abusive, or inept. And once in a while, an audio or audio-visual record may preserve aspects of a plaintiff’s examination if the plaintiff may be unavailable when the case finally reaches trial.

But the petition ignores the fact that physical and mental examinations *always* invade privacy.²¹ In Arizona, where privacy is uniquely part of our

vocational expert. . . . The fact that movant’s vocational expert is precluded from personally ‘examining’ claimant does not preclude mover from having its expert testify at trial as to the conclusions formed pursuant to review of such information.”) (citations omitted).

²¹ See, e.g., *Guilford Nat’l Bank of Greensboro v. Southern Ry. Co.*, 297 F.2d 921, 924 (4th Cir. 1962) (“Under Rule 35, the invasion of the

state constitution, special deference is due to the right of privacy.²² Indeed, courts have long held that a plaintiff does not waive all privacy rights by filing a lawsuit.²³

If the party to be examined opposes audio or audio-visual recording, our courts should always require that the party seeking the recording must show good cause for invading the plaintiff's privacy. After all, plaintiffs are not movie stars seeking public exposure. Plaintiffs are ordinary people with privacy rights deserving judicial protection. Requiring good cause to record their examinations is the least that courts can do to protect that privacy.

Having said that, a plaintiff can waive the right of privacy. Sometimes, a plaintiff may conclude that an audio or audio-visual recording is needed. For instance, it may be important to make a recording to document flaws in the examination, to preserve the examination's details, or to prevent abuse. If the plaintiff is willing to waive the right of privacy, then the plaintiff should have the right to require the examination's audio or audio-visual recording.

individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate.”).

²² ARIZ. CONST. art 2, § 8 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”).

²³ See, e.g., *Britt v. Superior Court*, 574 P.2d 766, 775 (Cal. 1978) (The California Supreme Court holds filing of a lawsuit may implicitly bring about a partial waiver of the constitutional right of privacy, “the scope of such ‘waiver’ must be narrowly rather than expansively construed.”).

Conversely, if the defendant seeking the examination opposes the plaintiff's decision to have the examination recorded, the defendant should have the burden of showing good cause. But in all cases, the plaintiff's privacy rights—and the choice to use or waive those rights—must remain paramount.

3. The judicial-order and good-cause requirements should remain.

The petition proposes eliminating the judicial-order and good-cause requirements for a Rule 35 mental or physical examination. While lawyers in most cases easily agree to mental or physical examinations, there are times when the plaintiff believes that the proposed examination is irrelevant or too invasive. Requiring a court order based on good cause reasonably protects a plaintiff's privacy and places the burden on the party seeking the invasive examination. And it lets an impartial judge decide if the proposed exam is relevant and respectful of privacy rights. In Arizona, that process has worked well for seven decades. The petitioner has shown no good cause for change.

Conclusion

The proposed changes to Rule 35 would subject plaintiffs to mandatory vocational examinations that are largely ex parte depositions by proxy. To the extent that the vocational examinations have physical-examination or mental-examination parts, standard Rule 35 physical and mental exams can

handle them. In fact, few cases would offer good cause for a mandatory defense vocational examination, since a defendant can obtain all the facts that its vocational-rehabilitation expert needs from other sources.

The proposal to allow presumptive recording of all physical and mental examinations is disconcerting. Physical and mental examinations already invade a plaintiff's privacy. Giving a defendant a presumptive right to record physical and mental examinations violates that privacy systematically. The proposed rule change will force plaintiffs to defend their right of privacy by filing costly, time-consuming motions for protective orders. This Court should not approve a rule change that so unfairly and needlessly jeopardizes, burdens, and invades the right of privacy.

Finally, the petition offers no strong reasons for eliminating the protections built into Rule 35's judicial-order and good-cause requirements. Normally, the parties can agree on physical and mental examinations. But when they disagree, logic and fairness place the burden on the party demanding an examination to convince an impartial trial court that there is good cause to invade the plaintiff's privacy. That is the system that Federal Rule of Civil Procedure 35 still follows—and the system that Arizona has followed for seven decades. It should remain in force.

As written, Rule 35 protects the privacy interests of persons subject to

physical and mental examinations. This Court should thus deny the petition.

DATED this 18th day of May, 2010.

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/s/ Stanley G. Feldman, Esq.

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Certificate of Service

On the above date, counsel electronically filed the original of this document in Word and pdf formats with the Clerk of the Court, Arizona Supreme Court, and mailed a copy to:

- John A. Furlong, Esq., General Counsel, **STATE BAR OF ARIZONA**, 4201 N. 24th St., Ste. 200, Phoenix, AZ 85016-6288, (602) 252-4804, Fax: (602) 271-4930, Petitioner.

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Appendix A

Rule 35, Arizona Rules of Civil Procedure (present version)

(a) Order for examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The person to be examined shall have the right to have a representative present during the examination, unless the presence of that representative may adversely affect the outcome of the examination. The person to be examined shall have the right to record by audiotape any physical examination. A mental examination may be recorded by audiotape, unless such recording may adversely affect the outcome of the examination. Upon good cause shown, a physical or mental examination may be video-recorded. A copy of any record made of a physical or mental examination shall be provided to any party upon request.

(b) Report of examiner. (1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requestor, within twenty days of the examination, a copy of the detailed written report of the examining licensed professional setting out the professional's findings, including the results of all tests made, diagnoses and conditions, together with like reports of all earlier examinations of the same condition and copies of all written or recorded notes filed out by the examiner and the person examined at the time of the examination, providing access to the original written or recorded notes for purposes of comparing same with the copies. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that such party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just and if a physician or psychologist fails or refuses to make a report the court may exclude the

physician's or psychologist's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule.

(c) Alternate Procedure; Notice of Examination; Objections. (1) When the parties agree that a mental or physical examination is appropriate but do not agree as to the examining physician or psychologist, the party desiring the examination may seek it by giving reasonable notice in writing to every other party to the action not less than 30 days in advance. The notice shall specify the name of the person to be examined, the time, place and scope of the examination, and the person or persons by whom it is to be made. The person to be physically examined shall have the right to have a representative present during the examination, unless the presence of that representative may adversely affect the outcome of the examination. The person to be examined shall have the right to record by audiotape any physical examination. A mental examination may be recorded by audiotape, unless such recording may adversely affect the outcome of the examination. Upon good cause shown, a physical or mental examination may be video-recorded. A copy of any record made of a physical or mental examination shall be provided to any party upon request.

(2) Upon motion by a party or by the person to be examined, and for good cause shown, the court in which the action is pending may, in addition to other orders appropriate under subdivision (a) of this rule, make an order that the examination be made by a physician or psychologist other than the one specified in the notice. If a party after being served with a proper notice under this subdivision does not make a motion under this rule, and fails to appear for the examination or to produce for the examination the person in the party's custody or legal control, the court in which the action is pending may

on motion make such orders in regard to the failure as are just, such as those specified in Rule 37(f).

(3) The provisions of Rule 35(b) shall apply to an examination made under this subdivision.

Appendix B

Rule 35, Federal Rules of Civil Procedure (present version)

Physical and Mental Examinations

(a) Order for an Examination.

- (1) *In General.*** The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.
- (2) *Motion and Notice; Contents of the Order.*** The order:
 - (A)** may be made only on motion for good cause and on notice to all parties and the person to be examined; and
 - (B)** must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

- (1) *Request by the Party or Person Examined.*** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.
- (2) *Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.
- (3) *Request by the Moving Party.*** After delivering the reports, the party who moved for the examination may request--and is entitled

to receive--from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

- (4) ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have--in that action or any other action involving the same controversy--concerning testimony about all examinations of the same condition.
- (5) ***Failure to Deliver a Report.*** The court on motion may order--on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.
- (6) ***Scope.*** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

Appendix C

Rule 35, Arizona Rules of Civil Procedure (proposed version)

Physical, mental and vocational examination of persons

(a) Notice for Examination. When the mental, physical, or vocational condition of a party, or of a person in the custody or under the legal control of a party, is in controversy, any other party may serve written notice on that party and all other parties requiring the party to submit to an examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The examination may occur no earlier than 30 days after the notice is served, unless the parties agree otherwise or the court orders an earlier date for good cause shown. The notice shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The person to be examined shall have the right to have a representative present during the examination, unless the presence of that representative may adversely affect the outcome of the examination. All fees and costs charged by the examiner, including any additional fees charged by the examiner related to the recording of the examination, shall be paid by the party noticing the examination

(b) Recording of Examination; Objections. Unless good cause is shown, any party may record by audio or audio-video means any physical, mental, or vocational examination. Any party who records an examination shall bear the expense of making the recording. Within five days of service of a notice of a physical, mental or vocational examination, any party intending to record the examination by audio or audio-video means must serve written notice to all parties disclosing that intent. Any party objecting to the video-recording or audio-recording of the examination may move for a protective order under Rule 26(c). A copy of any record made of a physical or mental examination shall be provided to any party upon request.

(c) Report of Examiner. If requested by the party . . . [no other proposed changes in rule]

(d) Objections to Examination. If a party or the person to be examined objects to an examination, that party or person must file a motion for

protective order under Rule 26(c) within ten days of the service of the notice for examination. The court in which the action is pending, may in addition to other orders appropriate under Rule 26(c), make an order that the examination be made by an examiner other than the one specified in the notice. If a party after being served with a proper notice under this rule does not make a motion for protective order and fails to appear for the examination or to produce for the examination the person in the party's custody or legal control, the court in which the action is pending may on motion make such orders in regard to the failure as are just, such as those specified in Rule 37(f).